No. 89-1632

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a person who is not under the physical control of a police officer has been "seized" under the Fourth Amendment.
2. Whether a person who is pursued by a police officer on a public street may avoid prosecution by discarding incriminating evidence and asserting that he did so out of fear of an unlawful search despite the absence of any evidence that the officer intended to conduct such a search.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, originally reported at 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989), was withdrawn from publication by order of the California Supreme Court on March 15, 1990. A copy of the opinion appears in the Joint Appendix at J.A. 126-145. The California Supreme Court denied review in this matter on March 15, 1990. A copy of the order of denial appears in the Joint Appendix at J.A. 146.

JURISDICTION

The opinion of the California Court of Appeal was filed on December 15, 1989. The California Supreme Court denied review on March 15, 1990, at which time the opinion of the court of appeal became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). A petition for writ of certiorari was timely filed on April 18, 1990, within 90 days of the denial of review by the state supreme court. Supreme Court Rules, rule 13.1. On October 1, 1990, this Court granted certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT

1. About 10:00 p.m. on April 18, 1988, Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department were on routine vehicular patrol, driving westbound on Foothill Boulevard. Assigned to a special duty drug task force, they drove an unmarked brown Dodge and wore blue jeans, tennis shoes, and blue jackets bearing the word "police" on the front and back. (J.A. 26.) As the officers turned south onto 63rd Avenue, they saw 4 or 5 young black men standing around a small red compact car parked on the west side of the street in front of 2663-63rd Avenue. The address was known to the officers as "an area of high narcotics activity where [the officers] have participated in several narcotic related arrests." (J.A. 28.) When one or more of the youths saw the officers' vehicle turning the corner, about 40 yards

away (J.A. 39), they immediately fled. Two of the youths ran southward on 63rd Avenue and then turned west toward the apartment complex at 2663-63rd Avenue; two others ran west to the rear of an abandoned house at 2665-63rd Avenue. (J.A. 28.) Officer McColgin did not recognize any of them. (J.A. 35.) The red car "proceeded southbound at a high rate of speed after the others ran." (J.A. 39.)

Officer McColgin drove the patrol unit to the curb where the red car had been parked. Officer Pertoso left the car, ran north on 63rd Avenue to Foothill Boulevard, turned west and continued running. (J.A. 40-41.) When Officer Pertoso left the car, "all of the individuals were out of sight." (J.A. 41.) Meanwhile, Officer McColgin drove south on 63rd Avenue, west on Bancroft Street, and north on 62nd Avenue looking for the youths. (J.A. 29.)

The reason for the officers' pursuit was that "we believed that there was some type of illegal [narcotics-related] activity occurring there" and "[w]e wanted to stop the individuals who had run and find out who they were and what their purpose was for being there in the area." (J.A. 29.)

As Officer Pertoso ran west on Foothill Boulevard, he saw respondent Hodari D. "running northbound [on 62nd Avenue] toward me but he was looking over his shoulder as if to be looking for someone to follow him." (J.A. 41.) When respondent turned his head and saw the officer, "he had a startled look on his face." (J.A. 46.) Standing about 11 feet from Officer Pertoso, appellant, "in an underhand scooping motion with the right hand," "discarded a single loose rock to the sidewalk along the side of the house." (J.A. 41-42.) At that point the officer

had not said or done anything other than "to be where he was." (J.A. 42.)

After appellant threw the rock to the ground, "he continued towards me." (J.A. 42.) Suspecting that the rock was cocaine, Officer Pertoso "forced [appellant] to the grass and handcuffed him." (J.A. 42.)

Officer Pertoso alerted Officer McColgin by radio that he was detaining a person in one of the yards. McColgin drove to the place where Pertoso had apprehended respondent and then retraced the route which respondent presumably had taken. He found a plastic sandwich bag containing approximately 15 rocks of suspected cocaine on the bottom stair of the house at 2663-63rd Avenue. (J.A. 31.)

It was stipulated that the rock discarded by respondent and those found in the plastic baggie contained cocaine. (J.A. 109.)

Officer Pertoso searched respondent and found $130 and a pager on his person. (J.A. 106.)

2. On April 20, 1988, the District Attorney filed a petition in Alameda County Juvenile Court, alleging that respondent came within the provisions of California Welfare and Institutions Code section 602, in that he possessed cocaine, in violation of California Health and Safety Code section 11350. (J.A. 1-2.) On May 2, 1988, respondent moved under Welfare and Institutions Code section 700.1 to suppress all evidence seized as a result of his detention. (J.A. 3-17.) The juvenile court denied the motion on May 19, 1988. (J.A. 93, 118.) On May 20, the court held the jurisdictional hearing and found true the

allegation that respondent possessed cocaine. (J.A. 110, 120.) On June 6, 1988, the court continued a previous wardship and ordered that respondent be committed to a county facility for a period not to exceed 68 months. (J.A. 114-115, 122.)

3. On December 15, 1989, the California Court of Appeal, First Appellate District, reversed the judgment of wardship, ruling that respondent had been unlawfully detained and that the evidence was discovered as a result of the detention. (J.A. 126-145.) On March 15, 1990, the California Supreme Court denied review. (J.A. 146.)

SUMMARY OF ARGUMENT

This case presents a factual scenario which occurs almost daily in the Nation's cities. A youth, sensing a police presence on the street, runs away. The police,

curious about the reasons for the flight, follow him. Fearing detention and search, the youth throws away incriminating evidence, often narcotics, hoping the police will not find it. But the officer picks up the contraband and arrests the youth. Thus completes the familiar sequence of recognition, flight, chase, abandonment, and apprehension.

In reversing the judgment of wardship against respondent, the California Court of Appeal held: (1) A police officer who runs after, or toward, a citizen on the street has effected a detention although physical control of the person is never acquired; (2) the act of running from police officers who had done nothing to provoke flight is insufficient cause for pursuit; (3) incriminating evidence abandoned in the face of police pursuit is the fruit of the poisonous tree. The court of appeal thus declared that a

police officer may not lawfully pursue -- or even run toward -- a citizen without specific cause to believe that he has committed a crime; if the officer does, the citizen may avoid prosecution by openly discarding anything in his possession, whether it is marijuana, cocaine, or a knife or gun. This view of the Fourth Amendment has given criminals an unjustified and preemptive form of protection and has taken from police a necessary means of investigating suspicious behavior.

The opinion of the court of appeal rests upon at least two fundamental misconceptions, either of which requires reversal of its judgment. First, when a person flees from the lawful presence of the police, the fugitive is not detained until the officer, by a show of authority or physical force, has terminated the freedom of movement or otherwise acquired physical control of that person. In

this case, respondent's unprovoked flight prompted reasonable police pursuit. When the officer, in an effort to intercept respondent, encountered him on the other side of the block from the initial sighting, respondent could not have known that the officer was pursuing him. A police officer's act of running on the street does not alone constitute a show of authority which detains, as a matter of law, every person in his path. In addition, when respondent threw away his cocaine, he was not under the physical control of the officer and therefore was not seized under the Fourth Amendment.

The state court also erred in concluding that because respondent was unlawfully seized, the contraband which he discarded was fruit of the poisonous tree. Under such circumstances, absent an official demand for disclosure or other manifestation of intent to search, the detainee's

attempt to discard or hide any incriminating evidence attentuates the connection between the prior illegality and the subsequent recovery of the evidence. The deterrent purpose of the exclusionary rule is not served by the suppression of evidence which was not sought by police but was, instead, voluntarily produced by respondent. That purpose is adequately satisfied by the traditional remedy of suppression of any evidence which the officer discovered by a search or ordered produced. The Fourth Amendment, which does not speak of "attempted" searches, does not require alternative remedies. In this case, the officer did not manifest an attempt to search respondent, who must accept sole responsibility for his decision to expose the cocaine.

ARGUMENT

I.

RESPONDENT, WHO NEITHER ACQUIESCED IN A SHOW OF AUTHORITY NOR WAS PHYSICALLY RESTRAINED BY POLICE OFFICERS, WAS NOT SEIZED UNDER THE FOURTH AMENDMENT.

In concluding that respondent had been seized when he produced his rock of cocaine, the court of appeal reasoned that a person who saw a police officer running toward him on the street would reasonably believe that he was not free to leave. The court rejected the argument that physical restraint was an element of a Fourth Amendment seizure but, in any event, found that the officer's actions were "tantamount" to a physical seizure. The state court's holding is unsound for several reasons. First, a person who flees from the lawful presence of police is not "seized" in any meaningful or constitutional sense of that word. A seizure by the police requires the purposeful termination of a citizen's freedom of movement, either by the use of force or by the display

of authority in which he has acquiesced. Respondent, whose unprovoked flight prompted police pursuit, was not seized when he dropped the rock of cocaine because there was (1) no assertion of authority which would have led a person reasonably to believe that he was not free to leave; (2) no acquiescence in any display of authority; and (3) no physical control over his movement.

A. A Seizure Requires An Official Act and A Restraint Upon Liberty.

We begin by defining the concept of "seizure" within the meaning of the Fourth Amendment. This Court has stated repeatedly that "[o]nly when the officer, by means of *physical force or show of authority*, has *restrained the liberty* of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added); *accord, Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984); *United States* v. *Mendenhall*, 446 U.S. 544, 552 (1980) (Opinion of Stewart, J.) A seizure comprises two necessary elements: (1) the restraint of liberty; *and* (2) action by the officer -- whether physical force or show

of authority -- which effects the restraint. In addition, the officer must intend that his act restrain the person; restraint as a result of official negligence is not a seizure under the Fourth Amendment. *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989) ("governmental termination of freedom of movement *through means intentionally applied*" [emphasis in original]); *accord, Michigan Dep't of State Police* v. *Sitz*, 496 U.S. ___, 110 L.Ed.2d 412, 420 (1990). Simply stated, "[a] Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go." *Chesternut*, at 577 (concurring opinion).

A court can usually ascertain the presence of physical restraint without difficulty (*e.g. Tennessee* v. *Garner*, 471 U.S. 1 [1985]), but the question of whether an officer's conduct in a specific instance amounts to a show of authority presents a more complex issue. To assist trial courts and officers in the field in the resolution of this question, this Court propounded an objective standard: "if,

in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. at 554; *accord, Michigan* v. *Chesternut*, 486 U.S. at 573; *INS* v. *Delgado*, 466 U.S. at 215; *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 514 (dissenting opinion).

It is important to understand the scope and function of the *Mendenhall* formulation. It has been generally assumed that it is equivalent to the definition of a seizure set forth in the *Terry* dictum. 1 W. LaFave, Search and Seizure § 2.1(a), p. 301 (2d Ed. 1987 and 1990 Supp.) [hereinafter LaFave]. This view is erroneous. Rather, *Mendenhall* explicates only the requirement of a show of authority, defining it as official conduct which would cause a reasonable person to believe that he is not free to leave. *Mendenhall* does not eliminate or otherwise alter the requirement of restraint of the citizen by the officer.[1/]

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1. The fallacy of the view that *Mendenhall* offers a complete definition of a seizure can be demonstrated by the following example. Suppose the police unmistakably indicate to a person that he is not free to leave, but he

A Fourth Amendment seizure has always required restraint or control of the citizen. The two means identified by this Court of exercising that control are physical force and a show of authority, for both unmistakably indicate to a reasonable person that he is not free to leave. In the case of the use of force, the person cannot leave; in the case of the manifestation of authority, the person knows that he may not leave. In either case, there cannot be a seizure without restraint upon the liberty of the person.[2]

Just as *Mendenhall* provided an objective standard for a display of authority, *Brower* v. *County of Inyo, supra*, set forth a bright-line definition of restraint: "a governmental

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nevertheless does so, and attempts to escape. Is he "seized" despite the lack of official restraint upon his movement? If so, does the "seizure" end if he successfully avoids the police? At what point is his escape successful so as to end the "seizure"? The *Terry* requirement of physical restraint, which provides a bright line and is faithful to the values protected by the Fourth Amendment, avoids such insoluble problems. See pp. 37-38, *infra*.

2. An alternative to the *Mendenhall* formulation might be: "A seizure occurs when a person acquiesces in what he reasonably believes to be an official display of authority."

termination of freedom of movement *through means intentionally applied.*" 103 L.Ed.2d at 635 (emphasis in original). Unless the officer has made "an intentional acquisition of physical control" of the citizen (*ibid.*), no seizure has occurred.[3]

We can discover no case in which this Court found a seizure in the absence of termination of freedom of movement, either through the use of force or display of authority. *E.g., Michigan Dep't of State Police* v. *Sitz, supra*; *United States* v. *Sokolow*, 490 U.S. 1 (1989); *United States* v. *Sharpe*, 470 U.S. 675 (1985); *United States* v. *Hensley*, 469 U.S. 221 (1985); *Florida* v. *Rodriquez*, 469 U.S. 1 (1984); *Michigan* v. *Long*, 463 U.S. 1032 (1983); *United States* v. *Place*, 462 U.S. 696 (1983); *Texas* v. *Brown*, 460 U.S. 730 (1983); *Florida* v. *Royer, supra*; *United States* v. *Cortez*, 449 U.S. 411 (1981); *Reid* v. *Georgia*, 448

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3. Somewhat paradoxically, the intent to seize is proved by the objective circumstance of whether a reasonable person would believe that he is not free to leave. *Mendenhall*, 446 U.S. at 554. Thus, intent to acquire physical control, if not communicated, is not a show of force and, thus, no seizure. *Chesternut*, 486 U.S. at 575 n.5.

U.S. 438 (1980); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Sibron* v. *New York*, 392 U.S. 40 (1968). *Michigan* v. *Chesternut, supra,* involved neither a show of authority by the officers nor physical restraint of the defendant. In finding no seizure, this Court chose to rely upon the first consideration, holding that a reasonable person would not have felt that he was not free to leave. 486 U.S. at 574-576. Consistent with this Court's unbroken line of precedent, the concurring opinion suggested that an independent justification for the Court's decision was the absence of "a restraining effect" upon the defendant *Id.* at 577 (concurring opinion). The teaching of this Court's cases is clear: a seizure of the person requires a termination of freedom of movement by the intentional use of either physical force or a show of authority to achieve that termination.

To avoid misunderstanding, we do not argue that only physical restraint, such as the use of handcuffs or the like,

could constitute a seizure of the person under the Fourth Amendment. Such a narrow construction of the Fourth Amendment would allow police to intrude unjustifiably into the privacy and personal security of citizens not reasonably suspected of wrongdoing with the simple and impermissible expedient of threatening -- but not using -- physical force. Our position, faithful to *Terry*, *Mendenhall*, *Royer*, *Delgado*, *Chesternut*, and *Brower*, is that a seizure occurs when police achieve physical control or termination of freedom of movement (those terms are functionally equivalent) through the use of force or a display of authority. Thus, a police officer who commands a pedestrian to stop has effected a detention not through the use of physical force but the exercise of his official authority.

To amplify further, an officer who approaches a person on the street has not effected a seizure in the narrow physical sense because the person remains physically able to walk away. If he choses not to do so, his termination of movement is self-imposed. Whether he is seized in the constitutional sense depends upon the

motivation for his decision to remain. If he does so because he wishes to cooperate with the officer, it is a consensual encounter and thus no seizure. If the person remains in obedience to what a reasonable person would perceive to be a show of authority, he has been seized under the Fourth Amendment. In the *Mendenhall* context, stationary acquiescence to a show of authority is the hallmark of a seizure.

B. <u>Respondent Was Not Detained.</u>

Judged by the foregoing analysis, the conduct of the police officers did not constitute a detention of respondent until Officer Pertoso forced him to the ground after respondent had thrown away the rock of cocaine. We analyze the constitutional significance of the officers' initial sighting of the youths and of Officer Pertoso's subsequent encounter with respondent.

1. <u>The Initial Sighting.</u>

It is indisputable that respondent was not "detained" when the officers turned the corner onto 63rd Avenue. The mere act of patrolling the streets is not a "show of authority" (*Terry*, at 19 n.16) so as to induce the belief in

a reasonable person that he is "not free to leave." *Mendenhall*, at 554. Were it otherwise, every citizen who sees a policeman in the performance of his duties would be "seized." *Cf. Michigan v. Chesternut, supra.*

Furthermore, it is not entirely clear that the youths even knew that McColgin and Pertoso were police officers. It will be recalled that the officers were patrolling in an unmarked car. Although the word "police" was imprinted on the fronts of their jackets, no state court expressly found that respondent or his companions recognized that identification in the darkness of the night at a distance of 40 yards. It is true that the youths immediately ran away upon seeing the vehicle, but this Court's decisions do not support a conclusion that a reasonable person would suspect that two men driving in a brown Dodge in this Oakland neighborhood at 10:00 p.m. are police officers.

Finally, no detention took place because the police officers were 40 yards from the persons who were running away. Under those circumstances the officers could not

have terminated the movement, or otherwise have acquired physical control, of the fleeing youths.

2. **The Encounter Between Respondent and Officer Pertoso.**

We turn to the heart of the case: the encounter between respondent and Officer Pertoso on Foothill Boulevard. The court of appeal explained its holding that respondent had been detained before discarding the cocaine as follows:

> "We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave. We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of *Chesternut*, this action is

> reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement. (*Michigan v. Chesternut, supra*, 108 S.Ct. 1975, 1980.)" (J.A. 134.)

We find two distinct reasons to disagree with the court of appeal. First, at the time respondent discarded his rock of cocaine, the officer had not displayed his authority to respondent; consequently, a reasonable person would not have believed that he was not free to leave. Second, at the time of the abandonment of the incriminating evidence, respondent's freedom of movement had not terminated, nor was he otherwise under the physical control of Officer Pertoso.

a. **No Show Of Authority.**

Respondent could not have known that Officer Pertoso had been an occupant of the brown Dodge.

Assuming the unlikely possibility that respondent had seen the word "police" emblazoned on the officer's jacket while Pertoso was seated in the car, the record establishes that he did not know that the officer left the car and circled around the block to intercept him. (J.A. 41.) The court of appeal correctly concluded that police conduct unknown to the citizen cannot constitute to a display of authority which would lead a reasonable person to believe that he is not free to leave. (J.A. 133); *Michigan* v. *Chesternut*, 486 U.S. at 575 n.7. But this factual premise makes the lower court's analysis all the more inexplicable. The court of appeal held that the sight of a police officer -- any police officer -- running in the general direction of a citizen on the street is a sufficient display of authority to lead that citizen reasonably to believe that he may not

leave. Neither law nor human experience supports this assertion.

Hardly a day goes by that an officer on foot patrol -- the cop on the beat -- does not have occasion to run in someone's direction for a socially desirable reason. He may do so to prevent a crime or to apprehend a person whom he has reason to suspect has committed a public offense. He may also be engaged "in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973). Thus, the officer may be required to engage in such non-investigatory matters "as giving aid to persons in distress, mediating domestic quarrels, assisting the elderly or disabled, furnishing traffic advice

or directions, and generally preserving the peace and protecting persons from harm or annoyance." *In re Tony C.*, 21 Cal.3d 888, 895-896, 148 Cal.Rptr. 366 (1978).

Of course, not all of the foregoing possibilities would require a police officer to hurry down the street of a residential neighborhood at 10:00 p.m., but it is irrefutable that the sight of a running police officer does not always support a reasonable belief that the officer intends to detain someone. For all a reasonable person in respondent's position could have deduced, Officer Pertoso -- coming from a direction *opposite* to that where respondent had seen the Dodge -- could have been answering a distress call or investigating some matter which had nothing to do with respondent.

It may be contended that respondent reasonably could have believed that he was the object of Officer

Pertoso's attention because, possessed of cocaine, he was in the act of committing a crime when he encountered the officer. A person's knowledge of his own wrongdoing, at least knowledge of which officer is unaware, cannot convert the officer's otherwise nonconfrontational conduct into a seizure. Such a principle would provide more protection to the guilty than to the innocent, a result which is surely inconsistent with the objectives of the Fourth Amendment. *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977); *People* v. *Holloway*, 176 Cal.App.3d 150, 156, 221 Cal.Rptr. 394 (1985); 3 W. LaFave, *supra*, § 9.2(h), pp. 407-408 (2d Ed. 1987 and Supp. 1990).

A police officer who walks down the street does not seize anyone who happens to be in his path. *United States* v. *Mendenhall, supra*; *Michigan* v. *Chesternut, supra*. The officer's conduct is not transformed into a seizure of

everyone in his vicinity by the simple and often necessary act of running. The mere fact that the officer is running in the general direction of a person is not a display of authority which would indicate to a reasonable person that he is not free to leave. The record must reveal other specific and articulable circumstances which, together with the officer's rapid movement, characterize that movement as a display of authority toward that specific person.

At the instant that respondent discarded his cocaine he knew only that the officer was running in his direction. There was no "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States* v. *Mendenhall*, 446 U.S. at 554. Officer Pertoso did not

display a badge or gun, or command respondent to halt. Because respondent fled before Pertoso left the car, respondent could not have known that the officer had circled the block in an effort to intercept him. It follows that a reasonable person in respondent's position would not have believed that the officer's act of approaching in his direction was a display of authority which indicated that he was not free to leave. The state court erred in holding to the contrary.

b. **No Physical Restraint.**

Wholly aside from its conclusion that Officer Pertoso's conduct constituted a display of authority, we have a second reason to disagree with the court of appeal's ruling that a seizure had occurred when respondent discarded his contraband. At that moment there was not yet "a governmental termination of freedom

of movement" or, what is functionally equivalent, "an intentional acquisition of physical control." *Brower* v. *County of Inyo*, 103 L.Ed.2d at 635. When respondent saw the officer, he did not surrender to the officer. Instead, he performed two acts which were entirely inconsistent with submission to the presence of authority. First, he threw the rock of cocaine to the sidewalk. Second, he "continued towards" the officer, who only then "forced him on to the grass and handcuffed him." (J.A. 42.) The evidence is undisputed, and the trial court found (J.A. 55), that respondent was not in the control of Officer Pertoso until the latter forcibly restrained him by pushing him to the ground and handcuffing him.

The court of appeal opined that "the facts of the instant case illustrate a situation tantamount to a physical seizure. [Respondent,] who was running down the

sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked 'police,' who was 11 feet away and running toward him." (J.A. 137 n.4.) The court of appeal measured the relevant Fourth Amendment interests with too broad a gauge.

If respondent had been surrounded on the street by officers who deprived him of freedom of movement, he would have been seized under the Fourth Amendment. Instead, he encountered only Officer Pertoso, a single police officer who was, in effect, attempting to "tackle" respondent in the "open field" of a dark street. Had respondent chosen to do so, he could have attempted to elude Pertoso by, for example, running to the other side of the street or turning around and retracing his steps. Those possibilities reflect a freedom of movement which

undermines the state court's holding that respondent had been seized. Seizure requires the "intentional acquisition of physical control." *Brower*, at 635. There is a constitutional difference between the mere influencing of direction, found by the state court, and the acquisition of such control. A person with the options of movement which respondent possessed is not in the "physical control" of a police officer, although the officer has blocked the path of that person. Simply stated, respondent was not seized at the time he discarded the rock of cocaine because Officer Pertoso had not yet gained control over him. The trial court's finding on this issue is unassailably correct.

In finding control "tantamount to a physical seizure," (J.A. 137 n.4), the court of appeal relied upon the observation in *Chesternut* that the officer there did not

"control the direction or speed of [the defendant's] movement." 486 U.S. at 575. By negative implication, the state court reasoned, an officer's influence upon the direction or speed of movement amounts to a seizure. The court of appeal failed to realize that the basis of this Court's decision in *Chesternut* was the absence of a display of authority, not the lack of a restraining effect. Although an officer's attempt to influence a person's direction of movement in some instances may amount to a display of authority which leads a reasonable person to conclude that he is not free to leave, this Court has never held such an official action is an acquisition of physical control. A person whose direction is "influenced" is not seized if he is physically able to travel in that direction.

The conclusion that Officer Pertoso seized respondent when the two encountered each other is no more than a

prediction which hindsight proved accurate. The soundness of the state court's methodology must be tested by positing the contra-factual circumstances of successful flight and escape by respondent. The legal consequences of respondent's successful avoidance of Pertoso's capture are far from clear under the state court's reasoning. If respondent had eluded Pertoso, would the officer's subsequent pursuit have constituted a seizure? *Chesternut*, at 575-576 n.9; Note, *Michigan* v. *Chesternut* and Investigative Pursuits: Is There No End To The War Between The Constitution And Common Sense?, 40 Hast.L.J. 203, 214-219 (1988). If so, when would the seizure have ended? When respondent no longer could see the officer? When he reached a place of apparent safety? When he arrived home? When he (or a reasonable person) no longer allowed his conduct to be

influenced by the possibility of capture? When the statute of limitations ran? Resort to such fictions is unnecessary under this Court's present requirement of physical control. For these reasons, this Court should not abandon this requirement, which both provides a bright line and respects the history and purposes of the Fourth Amendment. *See Rakas* v. *Illinois*, 439 U.S. 128, 145 (1978). When respondent abandoned his cocaine, he was not under the control of Officer Pertoso, and therefore was not seized within the meaning of the Fourth Amendment.

C. Pursuit In The Wake Of Unprovoked Flight Is Not A Seizure.

Underlying the analysis of the court of appeal is the unarticulated premise that Officer Pertoso should not have been pursuing respondent at all and that their confrontation was not merely the beginning but the culmination of unreasonable police conduct which violated

the Fourth Amendment. We dispute the proposition that the officer's conduct implicated the provisions of that amendment.

To begin with, we do not argue that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Michigan* v. *Chesternut*, 486 U.S. at 572. Rather, we address only the conduct which this case presents: pursuit in the face of flight unprovoked by threatening or otherwise illegal police conduct. To determine whether such conduct constitutes a seizure,[4]

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4. As the state court of appeal correctly observed (J.A. 138), we did not contest the trial court's ruling (J.A. 54-55) that the officers lacked sufficient grounds to detain respondent. The prosecuting authority had argued that respondent was not seized at the time he discarded his cocaine (J.A. 50-51), and state law discourages the presentation on appeal of a new theory not raised at trial to justify a search. *People* v. *Smith*, 34 Cal.3d 251, 271, 193 Cal.Rptr. 692 (1983). Furthermore, this state's highest court had rejected the argument that flight alone justified a detention. *People* v. *Aldridge*, 35 Cal.3d 473, 479, 198 Cal.Rptr. 538 (1984). But we have never conceded the officers' conduct, if it constituted a seizure, was illegal. Our position was and remains that it was not a seizure at all. Recognizing that exclusionary rule considerations often define the scope of the right of privacy (1 LaFave, *supra*, § 2.1(d), at pp. 313-314 [2d Ed. 1987 and Supp. 1990]; A. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349, 403 [1974]), we argue that pursuit *by any officer* in the face of unprovoked flight does not encroach upon a commonly shared "sense of security" to the extent that it requires regulation under the Fourth Amendment. Amsterdam, *supra*, at 403; *United States* v. *White*, 401 U.S. at 786 (dissenting opinion). Thus it is appropriate to assess the reasons for pursuit, its efficacy, and the extent of the invasion into privacy which it occasions in order to determine whether it should be denominated a seizure under the Fourth Amendment in order to facilitate judicial review.

and is therefore subject to judicial review, we "assess[] the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting.)

Consistent with the time-honored observation that "[t]he wicked flee when no man pursueth" (*Proverbs* 28:1), this Court has declared that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect

to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Peters* v. *New York*, 392 U.S. 40, 66-67 (1968). Although this Court has also concluded that flight in some circumstances may be "ambiguous" (*Wong Sun* v. *United States*, 371 U.S. 471, 484 [1963]), this characterization was made in the context of determining that flight provoked by police did not amount to probable cause to arrest. *Id.* at 483-484. By contrast, we address the question whether unprovoked flight may provide grounds merely to pursue a citizen.

It is perhaps more useful to approach the issue by asking whether, as the court of appeal impliedly found, the Fourth Amendment should *always* forbid police from pursuing a person who suddenly turned and fled unless the officers have other information to connect that person to a crime. *See* 3 LaFave, *supra*, § 9.3(b), p. 433 n.60. Must the officer "stand by idly and watch the defendant run away" knowing that he "cannot follow after him without seizing him for purposes the Fourth Amendment?" *People* v. *Mamon*, 435 Mich. 1, 457 N.W.2d 623, 628 (1990). Clearly the answer is "no."

While an innocent reason may exist for flight, innocent conduct nevertheless may be suspicious. *United States* v. *Sokolow,* 490 U.S. at 11-12. The court of appeal incorrectly struck the balance between public safety and private security by creating a conclusive presumption that flight alone betokens innocence. Just as danger invites rescue, unprovoked flight invites inquiry. The Fourth Amendment does not compel police to "be ignorant as [officers] of what [they] know as men." *Watts* v. *Indiana*, 338 U.S. 49, 52 (1949).

Balanced against society's need to investigate suspicious behavior is the extent of the intrusion into privacy and personal security. The court of appeal presumed that every pursuit would result in a completed detention. By invalidating the officers's conduct, the court of appeal therefore necessarily disapproved police investigatory techniques which this Court has declared do not intrude upon Fourth Amendment values.

This Court has held that police surveillance does not constitute a search under the Fourth Amendment. *United States* v. *Knotts*, 460 U.S. 276, 281-285 (1983); *accord,*

United States v. *Karo*, 468 U.S. 705, 713-714 (1984). Nor does an officer necessarily seize one whom he approaches on the street to ask a few questions. *INS* v. *Delgado*, 466 U.S. at 216. It is simply not true that each pursuit will culminate in a *Terry* detention. In some instances the officer may wish to surveil the person's conduct in order to see where he goes and what he does. In other situations the officer may wish to see the fleeing person's face to determine whether he matches a photograph on a wanted flyer. No person, of course, has a reasonable expectation of privacy in his visage. *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973). Should the officer overtake the person pursued, the officer's subsequent conduct may involve nothing more threatening than the asking of a few questions. In all of these situations, involving "nonoffensive contact if it occurred between two ordinary citizens" (3 LaFave, *supra*, § 9.2(h), p. 412), the encounters are not seizures. Under the analysis of the court of appeal, however, each would potentially violate the Fourth Amendment.

Finally, although the possible existence of less restrictive alternatives is irrelevant to a determination whether a search or seizure is reasonable (*United States* v. *Sokolow, supra,* 490 U.S. at 12; *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 [1985]), the lack of such alternatives is surely relevant to the issue of whether a particular police practice is a search or seizure at all. We can think of no alternative to pursuit which would achieve the valid investigatory goals of surveillance, visual identification, and the attempt to question about the reasons for flight. Although one commentator has suggested the state's interest in surveillance could be satisfied by permitting the police to follow, rather than to chase (Note, *supra*, 40 Hastings L.J. at 228), such a rule provides no discernible guideline for police, for it is often impossible to determine when the act of following has become a "chase." *See People* v. *Mamon, supra*, 435 Mich. 1, 457 N.W.2d at 627 n.8 (1990). If the person is walking at a speed of two miles per hour but the officer is pursuing at three miles per hour, is it a "chase" even if two blocks still separate them? *Id.* at 1, 457 N.W.2d at

628. In addition, following without approaching a person makes impossible the valid objectives of identification and interviewing.

For the foregoing reasons, the court of appeal erred in its balance of competing interests present in the context of a pursuit in the face of unprovoked flight. The public interest is substantial, no other means are available to achieve that interest, and the impact upon private security may be nonexistent. "Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so." *Rakas* v. *Illinois*, 439 U.S. at 147. In the case of unprovoked flight, the prevalent factual premises lead ineluctably to the conclusion that pursuit is not a seizure under the Fourth Amendment until physical control of the person is acquired by means of force or a show of authority.

It has been suggested that the requirement of physical control would exclude from Fourth Amendment reach various forms of threatening but otherwise non-restraining police conduct intended to be "evidence-gathering

technique[s]" (3 LaFave, *supra*, § 9.2, at p. 39 [Supp. 1990]), or "harassing police misconduct that seeks to prompt the victim into revealing what would otherwise be the product of an unreasonable search and seizure if conducted by the officer." E. Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff.L.Rev. 399, 419 (1971). As we explain more fully in Argument II, police conduct which a reasonable person would believe is intended to produce incriminating evidence is a search which is subject to the strictures of the Fourth Amendment. *Cf. Brower* v. *County of Inyo*, 103 L.Ed.2d at 636. The record in this case is barren of evidence to indicate that Officer Pertoso intended to search respondent. When respondent and Pertoso encountered each other in the street, the officer had done nothing by word or deed to manifest a desire to conduct a search.

It may also be suggested that the requirement of physical restraint would leave unregulated those forms of official misconduct intended solely to harass, or in which the police may engage when they "have no interest in

prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." *Terry* v. *Ohio*, 392 U.S. at 14. This case, which involves pursuit in the wake of unprovoked flight, presents no such scenario, and we endorse no such conduct. If such harassing law enforcement practices should eventually come before this Court, "there will be time enough then to determine whether different constitutional principles may be applicable." *United States* v. *Knotts*, 460 U.S. at 283-284. For now, it is enough to note that respondent was not the victim of such a reprehensible police practice.

II.

RESPONDENT'S ABANDONMENT OF HIS COCAINE WAS NOT FRUIT OF THE POISONOUS TREE.

Even assuming that respondent was unlawfully "seized" when he initially encountered Officer Pertoso, we urge that the rock of cocaine which he threw to the street was admissible in evidence under the Fourth Amendment.

It is beyond dispute that his abandonment[5] of the incriminating evidence was voluntary in the sense that the officer did not order him to discard or surrender it. *Abel* v. *United States*, 362 U.S. 217, 241 (1960); *cf. Smith* v. *Ohio*, 494 U.S. ___, 108 L.Ed.2d 464, 468 (1990). However, the court of appeal found that the exposure of the cocaine was an exploitation of the officer's illegal activity:

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5. "The test for abandonment in the search and seizure context is distinct from the property law notion of abandonment: it is possible for a person to retain a property interest in an item, but nevertheless to relinquish his or her reasonable expectation of privacy in the object." *United States* v. *Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989). For the reasons set forth in the text, *infra*, the critical issue is whether respondent's surrender of his expectation of privacy of the cocaine to public view is constitutionally attributable to any official misconduct which violated the Fourth Amendment. E. Mascolo, The Role of Abandonment in the Law of Search and Seizure, supra, 20 Buff.L.Rev. at 415-421. If there is no such exploitative nexus, the exposure of the cocaine was not the result of a search. Its subsequent seizure was justified because the officer had a right to be on the street, and from that vantage point saw an item whose incriminating character was "immediately apparent." *Horton* v. *California*, ___ U.S. ___, 110 L.Ed.2d 112, 123 (1990); *Arizona* v. *Hicks*, 480 U.S. 321, 326-327 (1987).

> "Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing [respondent] was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. [Respondent's] act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. [Citation omitted.] To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." (J.A. 142-143.)

The above quotation adequately describes the causal connection between the officer and the ultimate recovery of the contraband; if not for the officer's efforts to detain respondent, the latter would not have thrown away the

cocaine but would have kept it secreted in his pocket and gone on his way. The court of appeal failed to identify the exploitational nexus between the officer's presence and the abandonment of cocaine. Specifically, the court did not explain how the illegal nature of the officer's conduct purposefully produced the contraband.

A. <u>Because There Was No Intent To Search, There Was No Fruit Of The Poisonous Tree.</u>

In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), this Court rejected the broad test of physical causation, which the court of appeal in reality applied in this case. Instead, this Court declared that "the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 488. All of the cases decided by this Court under the "fruit of the poisonous tree" rubric have in common one critical element entirely lacking in this case: All have involved a purposeful

attempt by law enforcement authorities to gather evidence, either at the time of the illegality or subsequent to, and in exploitation of, the illegal conduct. Without such an intent there can be no exploitation within the meaning of *Wong Sun*.

In *Wong Sun* itself, for example, after illegally arresting "Blackie" Toy, one of the officers advised him that "[Hom Way] says he got narcotics from you." *Id.* at 474. Toy's subsequent inadmissible statement was in response to the officer's confrontational advisement, which was "reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). *Brown* v. *Illinois*, 422 U.S. 590 (1975), also involved interrogation after an illegal arrest. *Accord, Lanier* v. *South Carolina*, 474 U.S. 25 (1985); *Taylor* v. *Alabama*, 457 U.S. 687 (1982); *Dunaway* v. *New York*, 442 U.S. 189 (1979).

Even in those cases in which this Court found no fruit of the poisonous tree because of inevitable discovery, independent source, or another theory of attenuation, the police had engaged in an effort to gather tangible evidence, incriminating statements, or the testimony of

witnesses. *E.g., New York* v. *Harris*, 495 U.S. ___, 109 L.Ed.2d 13 (1990); *Murray* v. *United States*, 487 U.S. 533 (1988); *Oregon* v. *Elstad*, 470 U.S. 298 (1985); *Segura* v. *United States*, 468 U.S. 796 (1984); *Nix* v. *Williams*, 467 U.S. 431 (1984); *United States* v. *Crews*, 445 U.S. 463 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

Exploitation in the constitutional sense requires an intent to acquire more evidence than that which the primary illegality provides. In the present Fourth Amendment context, quite simply, the officer must intend to conduct a search for evidence. We believe that *Brower* v. *County of Inyo, supra*, is compelling authority for this proposition.

In *Brower*, this Court, relying upon *Hester* v. *United States*, 265 U.S. 57 (1924), declared that the recovery of incriminating evidence discarded by a defendant while he fled from police was not a seizure under the Fourth Amendment. 103 L.Ed.2d at 636. "Thus, even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action

by the police, the Court held that no seizure had taken place. It would have been quite different, of course, if the revenue agent had shouted 'Stop and give us those bottles, in the name of the law!' and the defendant and his accomplice complied. Then the taking of possession would have been not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred." *Ibid.*

Brower provides the analytical framework with which to resolve the present issue. Here, as in *Hester*, the defendant would not have discarded the evidence but for the officer's action. Such a causal nexus is not sufficient to invoke the Fourth Amendment exclusionary sanction, however. Rather, the taking of possession must be the intended result of the very means which the officer selected. In this case, had Officer Pertoso manifested an intent to seize evidence by ordering, "Take out what you have in your pockets," or even "I intend to search you," respondent's production of the cocaine would have been a *search*: the intended result of the officer's actions.

Officer Pertoso, of course, did not verbalize such an intent. He merely ran in respondent's general direction. For reasons which follow, we do not believe that such action indicated an intent to search. Absent such an intent, communicated to respondent, the subsequent recovery of the contraband was not a *seizure*.

The record in this case contains no evidence, and consequently there is no state court finding, that Officer Pertoso intended to search respondent. A conclusion of such intent must be based, if at all, upon a presumption that an officer who effects an illegal detention will also conduct an illegal search of the person. A presumption is, after all, a rule of law which resolves a question of fact in the absence of evidence. In the context of a Fourth Amendment claim, a presumption must be based on "factual premises" that are "so generally prevalent that little would be lost and much would be gained" by adoption of the presumption. *Rakas* v. *Illinois*, 439 U.S. at 147. We do not believe that the necessary predicate facts exist to justify such an unprecedented presumption.

Cf. Francis v. *Franklin*, 471 U.S. 307, 314 (1985).

It is one thing to detain -- or threaten to detain -- a person on the street; it is quite another matter to commit the additional intrusion of searching him for weapons. To do so, the police officer "must be able to point to specific and articulable facts" which indicate that the detainee was armed and dangerous. *Terry* v. *Ohio*, 392 U.S. at 21, 30; *Adams* v. *Williams*, 407 U.S. at 146. If a police officer intends to detain a person on the street, even illegally, it does not follow that he will commit the additional intrusion of conducting a pat search, let alone a search sufficiently intense to uncover a rock of cocaine. For example, a police officer who mistakenly but in good faith believes that he has grounds to detain a person on the street may also conclude (correctly) that the person's behavior does not justify a search of the person. The detention is no less unlawful by reason of the officer's

good faith, but that same state of mind rebuts any presumption that he will engage in further unlawful conduct. In other words, a rule that an unlawful seizure of a person will inevitably result in an unlawful personal search of that person necessarily assumes the bad faith of every officer who transgresses the provisions of the Fourth Amendment, however inadvertently. This Court has recognized that not every violation of the Fourth Amendment involves knowing misconduct. *United States* v. *Leon*, 468 U.S. 897 (1984); *United States* v. *Peltier*, 422 U.S. 531 (1975); *cf. Michigan* v. *Tucker, supra*.

The court of appeal provided no empirical data, and we can discover none, which suggests that police officers detaining persons in the street are likely to violate the Fourth Amendment knowingly. In the absence of such

evidence,[6] we see no reason to presume the prevalent bad faith of an entire class of peace officers who are charged with preserving the security of the citizenry.

The state court of appeal asserted that suppression of the cocaine served the purpose of the exclusionary rule by deterring police from attempting to detain persons without reasonable suspicion of wrongdoing. (J.A. 143.) However, application of the exclusionary rule, which exacts "substantial social costs" (*Leon*, at 907), "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). At the very least, the sanction of exclusion should be appropriate to address the

6. Studies have shown that police do not frisk every person whom they detain. 3 LaFave, *supra*, § 9.4(a), p. 505 n.26. There is no reason to believe that these findings are less true in those instances which involve illegal detentions.

official misfeasance in question. *See Illinois* v. *Krull*, 480 U.S. 340, 352 (1987). It is particularly inappropriate in this case.

For the reasons stated in Argument I, the officers' conduct did not violate the Fourth Amendment at all. The chase, undertaken in response to respondent's unprovoked flight, was reasonable conduct and did not restrain respondent at the time he discarded his cocaine. Thus, there was no misconduct which required deterrence. Even if the officers' pursuit implicated the Fourth Amendment, suppression of the evidence would have no significant deterrent effect. The officers intended to detain respondent for questioning, not to search him. Suppression of the cocaine, an unintended product of the chase, will provide little, if any, deterrence to police officers who want only to detain a person to ask a few

questions and have no concern about conducting a search.

To avoid any misunderstanding, we do not argue that the answers to questions posed by an officer during an illegal detention are admissible under the Fourth Amendment, for surely they are not. *Taylor* v. *Alabama, supra; Dunaway* v. *New York, supra*. Because the questioning is purposeful, suppression of the answers presumably will further the goal of deterrence. Nor do we assert the legality of plain sight observations made by an officer who has unlawfully detained a motorist in his automobile. *Cf. Harris* v. *United States*, 390 U.S. 234, 236 (1968). An officer must be held to understand that the inevitable consequence of such a detention is the opportunity to observe what otherwise would have been unavailable to him. We merely argue that pursuit, even detention, by an officer who has not manifested an intent

to search is, for that reason, not a search. *Brower* v. *County of Inyo, supra.* On the other hand, the decision of a person threatened with a detention to hide or discard incriminating evidence is "'an intervening act of a free will'" which attentuates the connection between any illegality and the recovery of evidence. *Wong Sun*, at 486, 491. The contrary rule applied by that state appellate court leaves to the fugitive, rather than to the courts, the determination of the appropriate exclusionary sanction for an unlawful detention.

Persons in respondent's position are not left defenseless by this result. As the trial court perceptively analyzed the issue:

> "[I]f you don't discard [the evidence] and the police find it as a result of an illegal search, it will automatically be suppressed. Just logic tell[s] me there's no justification for saying if you throw it away just before the cop get[s] to

> you when he's chasing you, it will be suppressed. It should be suppressed. If you leave it in your pocket and he searched you illegally, it's guaranteed to be suppressed. No question about it." (J.A. 73.)

When respondent threw away the cocaine, he was not attempting to vindicate the security of his person. Rather, he tried physically to disassociate himself from the contraband in an effort to exculpate himself. Despite the Fourth Amendment's silence on this preemptive form of self-help, the court of appeal chose to legitimate it and, in so doing, created a brand-new constitutional right: the right of a person who fears detention by a police officer to immunize himself from prosecution by discarding incriminating evidence on his person. This transformation of a desperate act of attempted exculpation into a constitutionally protected right is unnecessary to vindicate the purposes of the exclusionary rule and is unfaithful to

the language of the Fourth Amendment, which does not speak of "attempted" searches and seizures.

B. <u>Applicable Legal Standard.</u>

Finally, we address the standard to be applied in determining whether a citizen is entitled to believe that an officer intends to search him. Recent decisions of this Court have taught that an inquiry into the reasonableness of police conduct under the Fourth Amendment requires an objective assessment of the actions of the police in light of the circumstances confronting them. *See Graham* v. *Connor*, ___ U.S. ___, 109 S.Ct. 1865, 1872 (1989); *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); *Scott* v. *United States*, 436 U.S. 128, 136-138 (1978); *but see Murray* v. *United States*, 487 U.S. at 542. The

reasonable person standard should be equally applicable to the determination of whether an officer's conduct constitutes a search: If, in view of all of the circumstances surrounding the incident, a reasonable person believes that the officer intends to search him with sufficient intensity to discover evidence, then his actions in the production of incriminating evidence must be attributable to the officer's conduct and thus a search under the Fourth Amendment.

It may be argued that this formulation provides no bright line to determine the admissibility of evidence discarded by a person fleeing from the police. "Probable cause" and "reasonable suspicion," also requiring a consideration of the totality of the circumstances (*Illinois* v. *Gates*, 462 U.S. 213, 230-241 [1983]; *United States* v. *Cortez*, 449 U.S. at 417), are similarly amorphous. More

fundamentally, this argument is beside the point. As we have endeavored to explain in both Arguments of this Brief, *Mendenhall* provides an inappropriate standard to determine the evidentiary consequences of police pursuit. The relevant issue is whether the officer's conduct invaded the person's reasonable expectation of privacy in his personal effects. *See Katz* v. *United States*, 389 U.S. 347 (1967); *accord*, *California* v. *Greenwood*, 486 U.S. 35 (1988); *California* v. *Circaolo*, 476 U.S. 207 (1986); *Smith* v. *Maryland*, 442 U.S. 735, 739-740 (1979). In other words, *Katz* provides the appropriate analytical framework to resolve the admissibility of the evidence in this case.

Under this formulation, which focuses upon a reasonable person's belief that a search is imminent, a person can be searched although not seized. Supporting this conclusion is the example in *Brower* of the officer who

ordered a fleeing person to surrender his possession "in the name of the law." 103 L.Ed. at 636. For the reasons set forth in Argument I, the person was not seized if he continued to flee after dropping the article; nevertheless, his abandonment of incriminating evidence was the result of a "search," for his discarding of the evidence was attributable to the officer's command. Under such circumstances the officer has searched the person as surely as if he had thrust his hand in the latter's pocket. A governmental intrusion into a person's reasonable expectation of privacy requires no physical trespass. *Katz* v. *United States, supra*, 389 U.S. 347.

In light of this conclusion, we discuss the types of evidence relevant to the reasonableness of a person's belief that an officer intends to search him. In the context of this case, such evidence includes the existence

of physical control by the officer of the person; the fact and nature of any show of authority by the officer; any other acts or words manifesting an intent to search; and any prior contacts between the person and the police officer.[7]

Although it cannot be accorded controlling significance, a person's status as a detainee is relevant to the reasonableness of his belief that he will be searched. The extent of the officer's control of the person's freedom of movement may induce a reasonable person to believe that a personal search is likely. Further, the likelihood of the search, and the reasonableness of the belief, are directly proportionate to the nature and intensity of the control. Thus, a person under custodial arrest reasonably

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7. The defendent must bear the burden of proving the exploitative nexus between the illegality and the challenged evidence. *Alderman* v. *United States*, 394 U.S. 165, 183 (1969).

can expect to be searched (*United States* v. *Robinson*, 414 U.S. 218 [1973]); a person under detention may assume its possibility but only if other circumstances support that conclusion; a person who sees an officer approaching him at a distance of one block has little reason to fear an immediate search; an officer even farther away poses a correspondingly smaller threat. *Cf. State* v. *Washington*, 364 So.2d 949 (La. 1978). As explained in part A of this Argument, the illegality of the detention, either actual or threatened, creates no conclusive presumption that an illegal search will occur; it is merely one factor to be considered in determining the reasonableness of the person's belief.[8/]

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8. Of course, an officer having reasonable cause to detain a person may, for that reason alone, pursue him. The discussion in the text presupposes no such cause and addresses the separate issue of when a person fleeing from police should reasonably fear a search.

Also relevant are the fact and nature of a show of authority. Just as an officer who approaches a person to ask a few questions does not manifest an intent to seize (*INS* v. *Delgado*, *supra*), *a fortiori* he would give no reasonable person cause to fear a search. *Cf. In re Kemonte H.*, 223 Cal.App.3d 1507, 273 Cal.Rptr. 317 (1990); *People* v. *Williams*, 109 Mich. App. 768, 312 N.W.2d 155 (1981). At the other end of the spectrum, an inappropriate show of authority or display of force would lead a reasonable person to believe that the officer intends to search. *Cf. Commonwealth* v. *Thibeau*, 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981). An officer's attempt to overtake a person on the street to question him, without more, is not such a show of authority. *Cf. State* v. *Sheffield*, 62 N.J. 441, 303 A.2d 68 (1973).

We reiterate that a person whose liberty has been unlawfully restrained by means of a show of authority or the use of force may not reasonably believe, based solely upon that illegality, that the officer intends to search him. More evidence is necessary to establish the reasonableness of that belief. To that end an officer's words or actions indicating a desire to search or seize evidence are relevant. *Cf. Brower* v. *County of Inyo, supra,* at 636. The person's previous experiences with the officer may also be competent evidence. 1 LaFave, *supra*, § 2.6(b), p. 474.

Judged by these standards, respondent's discarding of the contraband was neither the product of a search nor fruit of the poisonous tree.[9/] The officer had done

9. One distinguished commentator has suggested that even if the abandonment of incriminating evidence is not a search under *Brower*, it may still be fruit of the poisonous tree under *Wong Sun*. 3 LaFave, *supra*, § 9.2 at p. 40 & n.272.9 (Supp. 1990). We disagree. If there is no intent to search, and thus no search under *Brower*,

nothing to indicate to a reasonable person that he was not free to leave. For that reason alone respondent could not reasonably have feared a search. Additionally, he was not in the control of the officer, who could not have searched respondent under those circumstances. Furthermore, the officer had done nothing else by word or deed to indicate that he intended to search respondent. Finally, no evidence of prior harassment of respondent by Officer Pertoso appears in the record. Unreasonably fearing that he would be searched, respondent chose to engage in self-help by trying to discard the cocaine without detection. The Constitution does not always protect a person from the legal consequences of an unwise choice. *Cf. McGautha* v. *California*, 402 U.S. 183,

then there is also no exploitation, and thus no fruit of the poisonous tree under *Wong Sun*.

213 (1971). Respondent must now accept the consequences of his decision.

CONCLUSION

The judgment of the California Court of Appeal for the First Appellate District should be reversed.

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RESPECTFULLY SUBMITTED

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